It should be noted that the change in language regarding equipment rate regulation between the original House bill (which dealt with "equipment necessary for subscribers to receive the basic service tier")[43] and the 1992 Cable Act (which mentions "equipment used by subscribers to receive the basic service tier")[44] is not substantive. Rather, the change was made for two reasons: (1) to mirror the equipment language included in the 1992 Cable Act's "cable programming service" definition ("equipment used for the receipt of such video programming")[45], and (2) to "give[] the FCC greater authority to protect the interests of the consumer."[46] There is no evidence to suggest the revision was made to mandate an interpretation which would potentially expose the vast majority of the equipment offered by cable operators to the actual cost standard. First, virtually all cable equipment is capable of receiving signals for basic, non-basic, and pay programming. Second, in answer to the NPRM's question whether equipment exists that is designed to receive only certain types of programming, such as non-basic,[47] there

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[43]See H.R. Rep. No. 628 at 83.

[44]47 U.S.C. §543(b)(3)(A).

[45]Id. at §543(l)(2) (emphasis added). As the Commission notes at n.94 of the NPRM, Congress added installation and equipment to Section 623(c) at the same time that it changed "necessary" to "used" in Section 623(b)(3). Again, this demonstrates that Congress merely was attempting to harmonize these two sections.

[46]H.R. Conf. Rep. No. 862 at 64.

[47]NPRM at ¶65.

simply is little or no such equipment on the market, nor has there ever been in an environment of multi-tier offerings. Such a situation would require that multiple converter boxes be placed in the homes of subscribers to multiple service tiers -- a very expensive and very consumer unfriendly consequence.

Accordingly, the Commission should clarify that the capacity for cable equipment to receive non-basic and pay as well as basic programming cannot determine how it is regulated. Rather, the service level of the subscriber using particular equipment should determine its level of regulatory scrutiny. Thus, only equipment used solely to receive basic service should be subject to pricing based on actual cost. If equipment (such as a remote control) is not even offered to a basic-only subscriber, then it obviously cannot be deemed "used to receive basic service" and thus would not need to be priced based on actual cost. Rates or charges for equipment used by subscribers to receive cable programming services should be analyzed under Section 623(c), concerning unreasonable cable programming service rates. Equipment used for services that are neither basic nor cable programming services (i.e., "per channel," "per program," or "pay" services), should not be subject to any rate regulation, because such services are themselves exempt from rate regulation.[48]

Similarly, if the same equipment (such as a remote

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[48]See 47 U.S.C. §543(l)(2) (definition of "cable programming service" excludes "video programming carried on a per channel or per program basis").

control) that is offered to basic subscribers is also offered to and used by subscribers to receive higher levels of service, the equipment rate charged to the non-basic subscribers should be subject to non-basic rate standards contained in Section 623(c), or no regulation at all, depending on whether cable programming services or pay services were being subscribed to. For example, if the subscriber needs an addressable box to descramble tier service, the Section 623(c) rate regulation standard for cable programming services would apply. If, however, the subscriber uses the addressable box only to receive a pay programming tier, the device would not be subject to any rate regulation. Unless this distinction is maintained as to equipment common to different levels of service, Congressional intent would be thwarted.[49]

In addition to the foregoing legal arguments, there are technical reasons which support the above-listed distinctions between equipment used to receive basic service and equipment used to receive cable programming service. Basic service is almost universally offered on an unscrambled basis, thereby allowing access to that tier without the need for any terminal equipment, except in cases where the basic tier extends beyond the VHF band and a subscriber does not have a cable-ready set. In these limited cases, the converters provided to basic-only

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[49]In requiring that basic rates be "low," Congress has apparently anticipated that revenues from equipment used to receive non-basic or pay services might be used to subsidize rates for equipment used to receive basic service. See H.R. Conf. Rep. No. 862 at 63.

subscribers are relatively inexpensive, non-addressable boxes which are nothing more than extended tuners and are similar to the tuners which are built into so-called cable-ready sets. Accordingly, such equipment falls within Section 623(b)(3).

In contrast, addressable and programmable descramblers which are used to receive cable programming services, premium services and pay-per-view services provide sophisticated electronic technology and signal security features, such as descrambling, channel mapping, etc., which go beyond the simple tuner extension function of those converters which, in a few instances, may be used exclusively in connection with the receipt of basic service. Although the basic services may pass through addressable and programmable units along with cable and premium services, this is merely a consumer-friendly convenience which avoids the need of providing an A/B switch and, in some cases, a second set top box. Such basic services do not utilize or require the sophisticated descrambling/addressability features which are often incorporated into the devices which are used to provide tiers of cable service over and above the basic service. In short, an addressable box is not "used by subscribers to receive the basic service tier" in any situation where the basic service channels are not scrambled.[50]

Accordingly, the equipment price charged to basic-only subscribers can and should be distinguished from the equipment price charged to non-basic or pay subscribers who receive cable

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[50]47 U.S.C. §543(b)(3).

programming or pay programming services in addition to basic service, even where the same equipment can perform all three functions. Specifically, the addressable converter is to be reviewed under either the "bad actor" standard for cable programming services[51] or completely deregulated, depending on whether cable programming services or pay programming services are being scrambled.

2. Rate Setting Issues.

The 1992 Cable Act and the questions raised in the NPRM lead to various rate setting issues regarding equipment, including the meaning of "on the basis of actual cost," the ability of cable operators to bundle rates for equipment and installations while keeping them separate from cable service, and the regulation of rates for additional outlets. First, as indicated above, evaluating the pricing of cable equipment "on the basis of actual cost" does not literally mean "at actual cost."[52] Congress specifically provided for cable operators to earn a reasonable profit. Congress also specified that, in providing for the regulation of rates for the installation and lease of the equipment necessary for subscribers to receive basic service, "[t]he term 'actual cost' is intended to include such normal business costs as depreciation and service."[53] Moreover,

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[51] Id. at §543(c).

[52] See footnote 39 supra.

[53] H.R. Rep. No. 628 at 83.

the Commission correctly expresses concern that cable rates not be confiscatory, i.e., regulated at a price so low that cable operators cannot even cover their costs.[54] Accordingly, rates for the installation and lease of basic equipment must account for the following: installation, amortization, maintenance, financing, general administrative overhead, plus a reasonable profit. These are the basic costs associated with providing basic equipment and AOs, and thus were fully intended by Congress to be included in the basic equipment rate.

The Commission "tentatively conclude[s] that Congress intended to separate rates for equipment and installations from other basic tier rates."[55] While the separate tests established for the service and equipment components of basic service might suggest an effort to unbundle service from equipment, neither the 1992 Cable Act nor its legislative history, however, evidence an intent to prohibit "bundling" in any form of various equipment components. Thus, for example, the Commission should not prohibit a bundled rate for converters and remotes provided to subscribers. These two pieces of equipment are really two parts of one functional unit. The converter receives the signals from the cable system and delivers them to the television set, while the remote permits the subscriber to access the television set to select among such signals. The remote sends an infrared signal

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[54]See NPRM at fn. 66, 79; 138 Cong. Rec. S.14583 (Sept. 22, 1992) (statement of Sen. Lieberman).

[55]NPRM at ¶63.

which must be received and processed by the converter. One piece will not work without the other. Moreover, viewed separately, the price for remotes might be relatively low (e.g., $15-$25), while the converter price can be relatively high (e.g., $110-$150). The only sensible way to account for both the wide price difference between converters and remotes and the fact that they form a single functional equipment unit is to permit bundling of the equipment rate. Such rate, moreover, needs to reflect the short useful life, rapid obsolescence, and high rate of churn associated with such equipment.

Installation is another area where the NPRM raises several important issues. The Commission recognizes in the NPRM that "[m]any operators charge less than actual costs for service installation as part of their marketing efforts."[56] In fact, this is almost always the case. Installations are extremely costly, requiring considerable labor and "truck rolling," in addition to the cost of the wiring, equipment, etc. used in the installation. Similarly, cable operators commonly price subsequent service calls well below cost, or even free. It would contravene Congressional intent to preclude this flexibility for cable operators, which, as the NPRM recognizes, can result in increased cable penetration.[57] Such flexibility, therefore, should continue to include the unrestricted ability of cable operators to offer promotional discounts on installations as a

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[56]Id. at ¶70.

[57]Id.

mechanism to increase subscribership.

Accordingly, cable operators should be allowed to establish hourly installation rates to account for unique circumstances, including local labor costs, etc., which can vary widely. In the NPRM, "[t]he Commission recognizes that costs for installation will vary depending on whether the dwelling has inside cabling already. It may thus be more reasonable to require two installation rates, one for previously wired dwellings and one rate for inside cabling."[58] To account for such differences, installation rates should be subject to a reasonableness standard, whereby the rate would be deemed reasonable if no greater than the hourly installation rate charged by the local exchange telephone carrier ("telco") that provides service in the area. Such a standard should provide an adequate check against unreasonable installation rates, given that telephone installations require comparable trucks, equipment, skill levels, etc.

The NPRM also asks whether there should be a surcharge over the normal installation rate when the distance between a customer's premises and the operator's distribution plant is substantial.[59] Such situations are encountered frequently in the cable industry and fall into two general categories. One general category arises in situations where the cable operator's activated plant does not "pass" one or more homes within the

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[58] Id. at ¶69 (footnote omitted).

[59] Id.

franchise territory. Such situations are typically dealt with through a "line extension policy" whereby such subscribers might be required to advance a grant in aid of construction before service is provided. The other general category arises where the cable plant passes a given home, but the home is set back an abnormal distance from the street. In such cases, a "non-standard" installation rate is typically assessed over and above the standard fee. Adoption of the proposal that installation rates be deemed reasonable so long as they do not exceed the hourly rate allowed for the local telco would ameliorate at least the "non-standard" installation problem. But there is no reason why cable operators should not continue to be allowed to follow written line extension or non-standard installation policies, particularly if set forth in the franchise contract. Such an approach would be consistent with the "grandfathering" concept embodied in Section 623(j).

The NPRM correctly recognizes that Congress intended to treat additional outlets the same as other equipment, "conclud[ing] that cable operators should use the same cost methodology they use for installation of other equipment to calculate the rates for installation of connections for additional receivers."[60] Installation and maintenance of AOs is essentially similar to installation and maintenance of the initial subscriber drop, but it requires additional equipment and labor to connect AOs once the initial connection to the home is

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[60] Id. at ¶ 71 (footnote omitted).

made.[61] Accordingly, installation and maintenance of basic AOs should be regulated the same as the initial drop, as discussed above. The cable operator should be allowed to establish a reasonable hourly rate not exceeding that of the local telco, and promotional discounts should be permitted.

As is evident from its title, Section 623(b)(3) of the 1992 Cable Act only addresses the equipment component of AOs (i.e., installation and monthly maintenance). This subsection does not address the service component of AOs, which comprises a much greater portion of the typical charge. Thus, in addition to the proper standard for scrutinizing installation and monthly maintenance of AO equipment, the Commission needs to address the appropriate standard for the service aspect of AOs.

The service component of AOs is governed by Section 623(b)(1) and (2) of the 1992 Cable Act regarding rate regulation of cable service generally. As discussed above, the type of regulation of the AO service component would depend on the level of service being provided to the particular AO. Generally, each AO is just as valuable as the first set. In this regard, a cable AO is far different from an extension telephone, which only allows one conversation (unless the telephone subscriber pays for additional lines). In contrast, AOs permit

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[61]Engineering a cable system to be capable of service to multiple outlets can add significantly to an operator's costs. The capital expenditure needed to provide a sufficient signal level for multiple hook-ups and the resulting maintenance costs must be taken into account in determining the "actual cost" of an AO.

two residents of the same household to view different programming simultaneously.

The NPRM concludes that it was Congress' intent to unbundle basic service from basic equipment.[62] However, the Commission takes this conclusion a step further, "tentatively conclud[ing] that, to be consistent with the statute's intent, the rates for installation should not be bundled with rates for the lease of equipment."[63] Newhouse submits that there is no basis in the Act or its legislative history to support this expansive view of Congress' intent.[64] Indeed, the 1992 Cable Act deals with the lease of equipment used to receive basic service and the installation of such equipment in the same sentence and applies the same test.[65]

The Commission's sole rationale for its position is "that this unbundling could help to establish an environment in which a competitive market for equipment and installation may develop."[66] There is no evidence, however, that a competitive market for equipment and installation would be hindered by permitting cable operators to bundle equipment and installation

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[62] Id. at ¶63.

[63] Id.

[64] Similarly, nothing in the 1992 Cable Act prohibits the bundling of tiers of "cable programming service" with the equipment used to provide such service. See 47 U.S.C. §543(l)(2).

[65] Id. at §543(b)(3).

[66] Id.

rates. For example, a stroll down the aisle of Radio Shack or other electronics retailers demonstrates that a thriving market for many different types of equipment, including A/B switches and remote control units, already exists. There is no reason to believe that such market, including installations, will not continue to develop. If bundling of equipment were prohibited, on the other hand, cable operators would face an unnecessary intrusion into their business practices.

D. Costs of Franchise Requirements and Subscriber Bill Itemization.

Section 623(b)(2) of the 1992 Cable Act expressly requires that the Commission's basic rate formula, among other things, must account for costs related to PEG access channels,[67] other franchise obligations, franchise fees, and the direct costs of basic level programming (including, for example, retransmission consent payments).[68] Section 622(c) of the 1992 Cable Act expressly authorizes cable operators to itemize on subscriber bills the amount (1) of the total bill assessed as a franchise fee (and the identity of the franchising authority), (2) of the total bill assessed to satisfy any franchising authority imposed PEG access requirements, and (3) "of any other fee, tax, assessment, or charge of any kind imposed by any

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[67]The Commission's rate regulations must include standards to identify such costs. 47 U.S.C. §542(b)(4).

[68]Id. at §542(b)(2). See also id. at §325(b)(3)(A). (Commission required to account for impact of retransmission consent payments on basic rates.)

governmental authority on the transaction between the operator and the subscriber."[69] The Commission seeks comment on the interrelationship between these two Sections.[70]

The legislative history to Section 623(b)(2) indicates that, at least as pertains to basic rates, Congress' goal was "to help keep the rates for basic cable service low."[71] With respect to Section 622(c), the goal was to permit cable operators to identify for their customers fees and taxes that "drive up the rates." In short, these two provisions are designed (1) to provide fairness to cable operators, allowing them, for example, not to be prejudiced under any benchmark approach by costs that directly result from governmental cost increases, and (2) to facilitate the scrutiny of complete cable rate information by subscribers, so that the subscribers can make informed decisions as to the basis of cable rates and increases and otherwise hidden government taxes and levies.[72]

The most efficient way for the Commission to implement Section 622(c) and Section 623 in a consistent manner is to allow all of the foregoing costs to be itemized as separate charges over and above the basic rate authorized by the Commission's

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[69]Id. at §542(c).

[70]NPRM at ¶175.

[71]H.R. Conf. Rep. No. 862 at 63.

[72]See 138 Cong. Rec. S569 (Jan. 29, 1992)(statement of Sen. Lott)(purpose of subscriber bill itemization provision is to ensure that subscribers "will know it is not just the cable operator jacking up" prices).

benchmarks. Then, the formula will not have to deal with such costs, thereby promoting the goal of reducing the burdens on franchising authorities, cable operators, and the Commission.[73] Take, for example, two cable operators having systems of similar size, age, location, and configuration. Their net basic service rates (excluding franchise and government related costs) might well be the same applying the applicable benchmarks to be devised by the Commission. However, assume one cable system pays a five percent franchise fee and is subject to other onerous franchise or government related costs while the other is not. Obviously, these two systems should not be grouped together for purposes of establishing benchmark rates, unless only rates net of (i.e., excluding) such government costs are compared.

Similarly, take two cable communities served by the same headend, but whose franchising authorities impose the differing assessments as in example 1. The cable operator has incentives (including administrative ease in billing and marketing, etc.) to charge the same net rate to all of the system's subscribers. However, it is unfair to certain subscribers to require the same gross amount to be charged in each franchise area throughout the system. The result of such a requirement would be that subscribers in communities with lower government costs would be subsidizing those subscribers in communities with higher government costs. If such costs are itemized and removed from the benchmark analysis, however, the

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[73] See 47 U.S.C.§543(b)(2)(A).

cable operator would be able to charge the same net rate throughout the system, each community could judge the rate for purposes of meeting the basic rate benchmark, and subscribers with higher total bills would now know that government assessments on the cable operator account for that differential.

The Commission thus must make clear that the identification on the subscriber bill in the form of a "separate line item" is authorized by the express language of the 1992 Cable Act. The authority to itemize such amounts as a "separate line item" obviously allows more than hiding an explanation in a footnote buried in fine print at the bottom of the bill, as some franchise authorities have demanded.[74] Rather, the ability to disclose by line item means a separate line for each relevant government cost immediately below the cable operator's net service rate. Such pass-throughs should be added on below the line to allow the actual (net) basic rate to be uniform among

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[74]The Commission should in no way feel bound by the somewhat ambiguous discussion of itemization in the House Report which, in contravention of the express statutory language, appears to essentially prohibit itemization. See H.R. Rep. No. 628 at 86 (itemization provision prohibits the cable operator from itemizing $1.50 allocable to the franchise fee as a separate line item from a $28.50 net service rate on a $30 total cable bill, instead only permitting the cable operator "to include in a legend a statement that the $30 basic cable service rate includes a five percent franchise fee, which amounts to $1.50.") This language not only is at odds with the plain language of this Act, but it also relates to the House-passed bill, not the Senate bill whose itemization provision was adopted in conference. Furthermore, such a narrow interpretation of the subscriber itemization provision is in conflict with the principle, upheld by the U.S. Supreme Court, that government attempts to censor the content of customer bills violate the First Amendment. See Pacific Gas & Electric v. P.U.C. of California, 475 U.S. 1 (1986).

multiple communities served from the same headend, even if franchise-related costs differ. Only if itemized costs are displayed clearly among the separate charges which are then added to arrive at the total amount due can Congressional intent be realized for the subscriber to be shown the amount of the "total bill" that such assessments impose. This approach will allow a subscriber to see graphically, line by line, the true bottom line gross amount which is billed.

Once the costs and assessments to be itemized are identified, they must be "reasonably and properly" allocated among the various levels of service.[75] Franchise fees are readily allocable, since they are calculated as a percentage of revenue. Thus, a larger amount will automatically be allocated to expanded tier customers than to basic-only customers. However, since the basic service level must include both PEG access channels[76] and stations for which any retransmission fees might have to be paid,[77] the proportionate amount of these charges should be added to the bill of every subscriber since all subscribers receive basic.

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[75]47 U.S.C. at §543(b)(2)(C)(v).

[76]See id. at §543(b)(7)(A)(ii) ("[s]uch basic service tier shall, at a minimum, consist of the following: (ii) [a]ny public, educational, and governmental access programming required by the franchise to be provided to subscribers").

[77]Id. at §543(b)(7)(A)(i)("[s]uch basic service tier shall, at a minimum, consist of the following: (i) [a]ll signals carried in fulfillment of the [must carry] requirements of sections 614 and 615"); 1992 Cable Act §6 (generally requiring retransmission consent for the carriage of commercial broadcast stations).

E. Implementation and Enforcement.

The Commission seeks comment on the procedures and standards to be adopted for the purpose of implementing and enforcing basic cable service rate regulation.[78] According to Section 623(b)(5)(A), cable operators have been designated to "implement," and franchising authorities to "enforce" rate regulations established by the Commission. Newhouse submits that this scheme is intended to be as self-effectuating as possible.

Thus, we believe that cable operators should be required, pursuant to Section 623(b)(6), to give franchising authorities 30 days' notice of proposed basic service rate increases, after which time the proposed increase will automatically take effect.[79] Because the reasonableness of these proposed rate increases should, in the vast majority of cases, be readily discernible under a benchmark approach, this approach poses little or no risk to the public. Moreover, a rule that would permit the franchising authority to defer implementation of a proposed basic rate increase until the franchising authority affirmatively acts on the request will result in endless demands for information and indefinite delays in action on the

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[78] See NPRM at ¶¶79-89.

[79] 47 U.S.C. §543(b)(6). Newhouse submits that the 30 day notice provision in the 1992 Cable Act preempts any longer notice provisions contained in a franchise. Thus, franchise provisions that require operators to give more than 30 days notice of rate increases, either to the franchising authority or to subscribers, are unenforceable.

rate proposal.[80] Such a scheme is inconsistent with Congress' goal of expediency and minimizing the burdens in ratemaking procedures.[81]

While Newhouse believes that instances of rate proposals being reversed will be rare, we recognize that it is a possibility. While Congress did not expressly provide for refunds of unreasonable basic rates, Newhouse believes that the Commission's authority to prevent "evasions" empowers it to adopt a rule requiring refunds of that portion of a basic rate proposal found to be unreasonable.[82] In order to reduce uncertainty and to create incentives for prompt local decisionmaking, however, such a rule should permit refunds only for a period of up to 120 days.[83]

Finally, the Commission has asked for comment on alternative approaches to resolving disputes arising from local authorities' decisions regarding rate regulation.[84] Newhouse strongly believes that any such disputes should be resolved by the Commission, rather than the courts. We agree with the

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[80]Concern about arbitrary delay is particularly relevant when one considers jurisdictions, such as New York, that regulate cable at both the local and state level.

[81]See, e.g., 47 U.S.C. §543(b)(5); NPRM at ¶¶84-85.

[82]See 47 U.S.C. §532(h).

[83]One hundred and twenty days is ample time for local consideration of a rate proposal. Cf. 47 U.S.C. §543(d)(3) (requiring the Commission to decide must-carry complaints within 120 days).

[84]See NPRM at ¶87.

Commission's analysis that resolution by the Commission "might assure a more uniform interpretation of the standards and procedures adopted pursuant to the [1992] Cable Act."[85] Uniform interpretation of rate regulation disputes by one body will provide better guidance than conflicting decisions made by many different courts applying different states' laws. Decisions made by the Commission will also provide immediate precedent for disputes by other parties over similar issues. Finally, resolution by the Commission will be more expedient than a venture into crowded court dockets, and, therefore, is in accordance with Congress' intent, as stated in the plain language of the statute.[86]

II. CABLE PROGRAMMING SERVICE REGULATION.

A. Non-Basic Rate Formula -- The "Bad Actor" Test.

The FCC has requested comment on whether it should apply the same standard of reasonableness with respect to the regulation of non-basic service tier rates as it ultimately adopts with respect to the regulation of the basic level.[87] Although many of the concerns that are raised herein with respect to the FCC's basic rate formula are equally applicable to the

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[85] Id.

[86] See 47 U.S.C. §543(b)(5)(B) (regulations prescribed by the Commission under this subsection shall include "procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations").

[87] NPRM at ¶91, n. 127.

regulation of non-basic cable service tiers, substantial differences are warranted in the regulatory treatment of basic and non-basic services.

Initially, it is clear from the language of the 1992 Cable Act and its legislative history that Congress did not intend for the same degree of regulatory oversight for cable service tiers as for the basic level. While Congress provided for concurrent jurisdiction over basic cable service rates to be exercised by local, state and federal authorities, regulatory jurisdiction over non-basic service tiers is limited to the FCC. By requiring local authorities to implement local basic rate regulation pursuant to guidelines established by the FCC, Congress contemplated that rate regulation of basic service tiers would be the norm, and not the exception, where cable systems are not subject to effective competition. In contrast, with respect to cable services, the statute limits the FCC's regulatory authority to establishing "criteria. . . for identifying, in individual cases, rates for cable programming services that are unreasonable."[88] Clearly, with respect to non-basic services, Congress contemplated that rate regulation would be the exception rather than the rule.

That rates for non-basic services were not to be subject to the same pervasive regulatory structure as basic service is also evident from the legislative history of the 1992 Cable Act. The House Report states that:

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[88]47 U.S.C. §543(c)(1)(A) (emphasis supplied).

> The Committee recognizes that since cable rates were deregulated in 1986, there has been an increase in the quality and diversity of cable programming. While most operators have been responsible about rate increases in this deregulated environment, a minority of cable operators have abused their deregulated status and have unreasonably raised subscribers rates.[89]

Given the fact that non-basic service tiers will, by definition contain those new video programming services which are being developed to provide the diversity of programming which the legislation seeks to foster, the FCC must be careful to avoid a formula for the regulation of non-basic rates that would provide disincentives to the development of these new services.

Indeed, a similar concern was evidenced by Congress in the legislative history that accompanied prior versions of the legislation which contained a very similar provision allowing the FCC, in individual cases, to regulate unreasonable or abusive cable programming service rates. Thus, the House Report accompanying that earlier legislation stated that:

> The Committee recognizes that there has been a correlation between increases in cable rates since they were deregulated in 1986 and increases in the quality and diversity of cable programming that those additional revenues have created. The Committee intends Federal policy to continue to provide cable operators and programmers with incentives to invest in improving the programming available to cable subscribers. In order to protect consumers, its is necessary for Congress to establish a means for the FCC, in individual cases, to identify unreasonable or abusive rates and to prevent them from being imposed

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[89]H.R. Rep. No. 628 at 86.

upon consumers.[90]

The foregoing language demonstrates that in balancing the desire for greater diversity of service against the higher rates needed to support the development of new services, Congress felt that rate regulation of non-cable service rates was warranted only as a failsafe mechanism to safeguard the interests of consumers in the individual cases where a particular rate could be demonstrated to be abusive or unreasonable.

There are also significant differences in the criteria that the Commission is required to take into account in determining the reasonableness of basic and non-basic rates. With respect to basic rates, the statutory criteria relate either to the costs of providing or to the revenues derived from services provided on the basic tier.[91] Even with respect to joint and common costs of providing cable service generally, the Commission is directed to consider only such portion of those costs as is reasonably and properly allocable to the basic service tier in deriving a formula for the regulation of basic rates.[92] In contrast, with respect to cable programming services, the Commission is directed to look beyond the costs of providing such services and to consider the rates for similarly situated cable systems offering comparable programming, the

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[90]H.R. Rep. No. 682, 101st Cong., 2d Sess. 82 (1990) (emphasis supplied).

[91]47 U.S.C. §543(b)(2)(C)(ii),(iv),(vi).

[92]Id. §543(b)(2)(C)(iii),(v).

history of rates for cable programming services, and the rates, as a whole, for all cable programming and equipment and services offered on the system other than premium services.[93] Several observations flow from these differences.

First, with respect to the cable programming services, there is an even greater emphasis on comparing the rates on non-basic tiers with other comparable systems and allowing a greater deviation from the average within the zone of reasonableness established by the Commission as a safe harbor. Thus, in determining the reasonableness of non-basic rates, the Commission is required to consider not only the rates for cable systems subject to effective competition but also the rates for similarly situated cable systems that are not subject to effective competition but which offer comparable programming.[94]

Second, the statute requires the Commission to examine "the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system" other than premium services in determining the reasonableness of an operator's non-basic rate in individual cases.[95] Thus, with respect to non-basic rates, the Commission is not required to establish separate benchmarks of reasonableness as it is required to do with basic service and equipment, but only a single benchmark to determine whether operator's overall rates are

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[93] Id. at §543(c)(2)(A),(C),(D).

[94] Id. at §543(c)(2)(A),(B).

[95] Id. at §543(c)(2)(D) (emphasis supplied).

reasonable for the level of service provided.

Indeed, given the virtually unlimited variety in tiering and packages which might be subject to review under the non-basic benchmark and the greater flexibility given to the Commission in establishing a benchmark for the regulation of non-basic rates, the Commission's non-basic rate benchmark should take into account the overall charge to subscribers rather than establishing different benchmarks for different tiers of service and equipment. For example, such a "basket" approach might compare the per subscriber service and equipment revenues received by a cable operator, excluding revenues derived from per channel or per program services and equipment, and compare this per subscriber revenue against a per subscriber revenue benchmark of similarly situated cable systems. Such an approach would ease the burden on the Commission by obviating the need for separate analysis for each piece of equipment, service, and combination of service packages offered in situations where the overall rate charged by the operator is reasonable. Such an approach would also allow for greater marketing flexibility, thereby allowing cable operators to experiment with ways to most efficiently deliver video programming and equipment to subscribers.[96]

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[96]If the Commission adopts such a revenue-based "basket" approach, it must take steps to ensure that operators are not penalized for their marketing success. An operator who achieves higher revenues per subscriber not through a rate increase, but rather by increasing its additional outlet penetration should not be disadvantaged by that success.

B. **Procedural Issues.**

Whatever non-basic rate formula is adopted by the Commission, the fact that the statute allows a single subscriber or franchising authority to file a complaint challenging the existing non-basic rate or any future rate increase for non-basic services compels the conclusion that the Commission must quickly serve notice to these parties that a cable operator's non-basic rates will be given a high presumption of reasonableness and that such rates will be found unreasonable in only the minority of situations where such rates can be shown to be truly abusive. If the Commission does not promptly establish a mechanism to discourage the filing of frivolous and groundless "bad actor" complaints and for disposing quickly with such complaints, the Commission could find itself bogged down in individual rate hearings affecting virtually every cable system in the country. Such a result will have a chilling effect on the development of new programming services and the implementation of newly emerging technological improvements.

The complaint procedure adopted by the Commission must require more than a mere allegation "that cable rates have risen unreasonably within a given period."[97] In order for a complaint to meet the minimum showing required for Commission consideration, the complainant must be required to furnish the reasons why it believes the rates to be unreasonable. Where a cable operator's rates for non-basic service fall within the

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[97] NPRM at ¶100.